

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

WAYNE BYERS,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 89-168

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of the denial of an application to appropriate surface waters of a tributary to the Little Klickitat River came on for hearing before the Board, Wick Dufford, presiding, and Judith A. Bendor, chair, on April 20, 1990, in Yakima, Washington.

Wayne Byers represented himself. P. Thomas McDonald, Assistant Attorney General, represented the Department of Ecology. The proceedings were reported by Linda S. Stevens of Jackie Adkins and Associates.

1 Witnesses were sworn and testified. Exhibits were admitted and
2 examined. From the testimony heard and exhibits examined, the Board
3 makes the following

4 FINDINGS OF FACT

5 I

6 The Little Klickitat River rises in the Simcoe Mountains near
7 Satus Pass and flows southwesterly for about 33 miles before joining
8 the Klickitat River. The drainage of the Klickitat comprises
9 approximately 280 square miles, characterized by rugged, forested
10 mountains in the north which give way to rolling grasslands in the
11 plateau area of the south.

12 Much of the plateau area is developed for agricultural and
13 residential use. The river is joined along its route by a number of
14 perennial and intermittent tributaries. The river flows through the
15 City of Goldendale a little beyond its halfway point.

16 The climate of the area is warm and dry in summer. Annual
17 precipitation varies from 35 inches in the northern high elevations to
18 less than 15 inches in the southern part.

19 II

20 Wayne and Isabel Byers are owners of property along an unnamed
21 tributary of the Little Klickitat, locally known as Karl Creek, within
22 Section 36, Township 5 North, Range 16 East, Willamette Meridian. The
23 property lies on the north side of Highway 97, northeast of Goldendale.
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III

The Byers acquired their property as a place to live during retirement. They are vegetarians and wish to grow as much of their own food as they can. They desire water for a vegetable garden and for fruit trees, as well as ornamental shrubs and shade trees.

IV

On October 30, 1981, Wayne Byers applied (Application No. S4-27757) to the Department of Ecology for a permit to appropriate the waters of Karl Creek at the rate .01 cubic feet per second (cfs), for the purpose of irrigating a domestic garden of about 1/2 acre during the irrigation season. A pump was proposed to be installed to divert water from the stream to a sprinkler system.

V

The Byers' application was placed in a "hold" status and not processed, pending the completion of a general adjudication of the waters of the Little Klickitat drainage which had been commenced on October 13, 1980. The final decree in this matter (Klickitat County No. 12978) was not entered until February 17, 1987.

VI

One of the matters dealt with in the adjudication was a surface water permit issued to William Maas, the Byers' predecessor on the property. Maas received a permit in 1963 for .01 cfs from the creek for domestic supply, including a 1/2 acre lawn and garden. No

1 proof that the permitted appropriation was ever made was received in
2 evidence at the adjudication. Lacking such proof, the referee
3 recommended that no right be confirmed in relation to the permit
4 issued to Maas.

5 VII

6 The general adjudication was held in response to problems created
7 by chronic water shortages in the drainage. Two prior adjudications
8 had already been completed on Little Klickitat tributaries, Blockhouse
9 Creek and Mill Creek.

10 The three adjudications confirmed surface water withdrawal rights
11 to aggregate instantaneous withdrawals of 60.874 cfs within the
12 drainage. In addition, minimum flows were decreed to supply rights
13 for non-diversionary stock watering.

14 At the present level of development, average flows near the mouth
15 of the Little Klickitat range between 24 and 33 cfs between July 1 and
16 October 1. During the dry months, then, very little water is left in
17 the stream. In drought years, there may not be enough water available
18 to satisfy the total of rights confirmed in the basin.

19 VIII

20 The Little Klickitat lies within an area designated by a popular
21 Initiative in 1960 as an anadromous fish sanctuary. The sanctuary
22 includes most of the tributaries to the Columbia River downstream of
23 McNary Dam and was created to "preserve and develop" food fish and
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1 game fish resources in these streams.

2 Among other restrictions, within the sanctuary area:

3 Except by concurrent order of the director of fisheries
4 and director of game, it is unlawful to divert water
5 from rivers and streams which will reduce the
6 respective stream flow below the annual average low
flow, based upon data published in United States
geological survey reports. RCW 75.20.110.

7 IX

8 No instream flow for the protection of fish resources or other
9 non-consumptive uses has been established by regulation for the Little
10 Klickitat basin. However, Ecology's files reflect requests from the
11 fish management agencies of the state since the late 1940's asking
12 that no further diversions be allowed in the watershed.

13 Recently conducted flow studies demonstrate that, more likely
14 than not, at the present level of usage, water in the Little Klickitat
15 is below the average annual flow from mid-June until December.

16 Preliminary work on establishing in-stream flows to protect fish
17 habitat and fish in the Little Klickitat basin indicates a need for
18 substantially more water in the river than is now present in the
19 summer and fall.

20 X

21 Depressed summer flows are presently exerting negative impacts on
22 fish populations, through decreased habitat, increased predation,
23 increased temperatures, reduced oxygen availability.

1 Both the Department of Wildlife (formerly Game) and Department of
2 Fisheries have sent Ecology comment letters relating to pending
3 applications for appropriation (including Byers') in the Little
4 Klickitat basin. Both agencies have recommended that no additional
5 withdrawals be approved.

6 XI

7 The Northwest Power Planning Council is currently engaged in an
8 effort to enhance salmon and steelhead production in the Little
9 Klickitat drainage. Further reduction of instream flows would impede
10 the achievement of this goal.

11 XII

12 On November 30, 1989, Ecology issued its decision on the Byers'
13 application. The decision was to deny it. On December 29, 1989, the
14 Board received the Byers' appeal and assigned it docket number, PCHB
15 89-168.

16 XIII

17 In March of 1981, the Byers had a well constructed on their
18 property. This well is 217 feet deep and had an initial static water
19 level of 24 feet below land surface. However, the well does not yield
20 much water. In its initial test 150 feet of drawdown was experienced
21 after one hour of pumping at four gallons a minute. Subsequent
22 experience has shown that pumping can be sustained for only about
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1 one-half hour at a time with the pump at 200 feet. About an hour is
2 needed for recharge.

3 XIV

4 Water from the well is pumped to a storage tank. At present it
5 is used for the Byers' household needs. The well water has also been
6 used for the garden, being delivered by a gravity-flow drip system. A
7 sprinkler is rarely used.

8 The Byers' experience is that the well produces just enough water
9 for their household needs. Trying to supply both the house and
10 irrigate the garden from this source severely taxes the system.

11 XV

12 Karl Creek, like others in the basin, has reduced flows in the
13 dry summer season. The Byers' proposed diversion is, by all estimates
14 a very small one. Nonetheless, it would have some effect on stream
15 flows.

16 We find that the cumulative effect of a number of such small
17 withdrawals would reduce water available to existing downstream right
18 holders. Moreover, such cumulative effect would exacerbate the
19 already serious reduction in fish populations.

20 XVI

21 Any Conclusion of law which is deemed a Finding of Fact is hereby
22 adopted as such.

23 From these Findings of Fact the Board reaches the following
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1 CONCLUSIONS OF LAW

2 I

3 The Board has jurisdiction over the parties and the subject
4 matter. Chapters 43.21B, 90.54, and 90.03 RCW.

5 II

6 Ecology's decision here is governed by the four substantive
7 criteria of RCW 90.03.290: (1) beneficial use, (2) availability of
8 public water, (3) non-impairment of existing rights, and (4) the
9 public interest. Stempel v. Department of Water Resources, 82 Wn.2d
10 109, 508 P.2d 166 (1973).

11 The problem in the instant case is most simply described as one
12 of water availability, although, as often happens, there is an overlap
13 with the existing rights and public interest categories. What is
14 involved is a discretionary decision, legislatively assigned to
15 Ecology's good judgment. See Schuh v. Department of Ecology, 100
16 Wn.2d 180, 667 P.2d 64 (1983); Peterson v. Department of Ecology, 92
17 Wn.2d 306, 596 P.2d 285 (1979).

18 III

19 The discretionary decision in the case at bar concerns a "where
20 do you draw the line" question. Appellants' main argument is that
21 their use will be so small that its effects will not be noticed. If
22 their diversion is looked at in isolation, they are probably correct.

23 The problem, however, is that the allowance of many such small
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1 diversions, each individually of little impact, would have a
2 substantial impact--existing rights would be adversely affected, fish
3 habitat would be futher degraded.

4 Under the facts of the case, we were not convinced that we should
5 substitute a different judgment for the discretionary determination
6 made by Ecology. We conclude that the potential for cumulative
7 effects prevent the criteria of RCW 90.03.290 from being met.

8 IV

9 Appellants have, commendably, designed an efficient system which
10 does not waste water. However, the use which they seek cannot be
11 described as essential to their survival. Their well satisfies basic
12 household needs, and it is possible that a better source of
13 groundwater could be found on their property. A well yielding up to
14 5000 gallons per day would be exempt from permit requirements, RCW
15 90.44.050, but would provide adequate water for both house and garden.

16 Accordingly, there is no obvious public interest factor weighing
17 in favor of appellant's proposed surface diversion. On the other
18 hand, there are substantial public interest considerations weighing
19 against it, as expressed in modern legislation protective of fish
20 resources.

21 V

22 The water code, originally enacted in 1917, is no longer
23 exclusively a development code. Today it also calls for taking a
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1 careful look at instream values.

2 Since 1953, Ecology has been required to notify the fish
3 management agencies of water rights applications and has had authority
4 to reject them based on the recommendations received. RCW 90.03.280,
5 RCW 75.20.050. In 1979, a new policy section was added at RCW
6 90.03.005, stating in part:

7 It is the policy of the state to promote the use of
8 waters in a fashion which provides for obtaining
9 maximum net benefits arising from both diversionary
10 uses of the state's public waters and the retention of
11 waters within streams and lakes in sufficient quantity
12 and quality to protect instream and natural values and
13 rights.

14 Adding the specific legislation establishing the Columbia River
15 sanctuary to general expressions of legislative concern for fish
16 resources, the balancing of public interest concerns here comes down
17 on the side of the decision to deny Byers' application.

18 V

19 Appellants are concerned that all existing right holders are not
20 living within the limits on use established in their permits. Though
21 water savings might be accomplished by enforcement, this does not
22 provide a reason for authorizing new uses, such as those the
23 appellants seek.

24 VI

25 Any Finding of Fact which is deemed a Conclusion of Law is hereby
26 adopted as such.

27 From these Conclusions of Law the Board enters the following

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
PCHB No. 89-168

ORDER

The denial of Application No. S4-27757 is affirmed.

DONE this 14th day of June, 1990.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford

WICK DUFFORD, Member

Judith A. Bendor

JUDITH A. BENDOR, Chair